Supreme Court, U.S.
FILED
JUL 27 2004
OFFICE OF THE CLERK

No. 04-144

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
NORFOLK SOUTHERN RAILWAY CO., AND
NORFOLK SOUTHERN CORPORATION,

Petitioners,

v.

SHIRLEY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari To The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County

PETITION FOR A WRIT OF CERTIORARI

THOMAS E. DOVER
KEVIN C. ALEXANDERSEN
MONICA A. SANSALONE
HOLLY M. OLARCZUK-SMITH
GALLAGHER, SHARP, FULTON, & NORMAN
1501 Euclid Ave., Seventh Flr.
Cleveland, Ohio 44115
(216) 241-5310

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
CHRISTIAN M. L. BONAT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LAURA D. HUNT
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 664-5022

Counsel for Petitioners

July 27, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED FOR REVIEW

Whether a general release executed by a plaintiff with advice of counsel to compromise a claim for asbestos-related injury is invalid under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 55, thus allowing survival and wrongful death claims for asbestos-related cancer to be brought even though they are expressly covered in the release.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, American Financial Group, Incorporated, was a party to the proceedings in the court below.

RULE 29.6 STATEMENT

Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into petitioner Norfolk Southern Railway Company, the parent of which is petitioner Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of Norfolk Southern Corporation's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
JUDGMENT FOR WHICH REVIEW IS SOUGHT	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Statutory Background	4
B. Factual Background	5
C. Proceedings in the Court Below	8
REASONS FOR GRANTING THE WRIT	11
I. THE RULING BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS	12
II. THERE IS A MATURE AND ACKNOWLEDGED CONFLICT AMONG THE LOWER COURTS CONCERNING THE VALIDITY OF FELA RELEASES.	16
III. REVIEW IS NECESSARY TO FORESTALL FURTHER DEGENERATION OF THE ASBESTOS-LITIGATION CRISIS	21
CONCLUSION	25

TABLE OF AUTHORITIES

CASES Page

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 21
Lester Anderson, et al. v. *Norfolk & W. Ry. Co., et al.*, No. CV-84-83441 (Cuyahoga County Ct. Com. Pl. Nov. 20, 1984) 6
Babbitt v. *Norfolk & W. Ry.*, 104 F.3d 89 (6th Cir. 1997) 3,16, 18
Boyd v. *Grand Trunk W. R.R.*, 338 U.S. 263 (1949) 11, 24
Callen v. *Pennsylvania R.R.*, 332 U.S. 625 (1948) 2, 5, 12, 13, 20
Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975) .. 10, 11
Davison v. *Norfolk S. Ry.*, No. CL02-36, 2003 WL 21536815 (Va. Cir. Ct. June 6, 2003) 17
Dice v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) 3, 5, 24
Duncan v. *Thompson*, 315 U.S. 1 (1942) 11, 20, 24
Fannin v. *Norfolk & W. Ry.*, 666 N.E.2d 291 (Ohio Ct. App. 1995) 9
Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) 3
Gilmore v. *Southern Ry.*, 229 F. Supp. 198 (E.D. La. 1964) 14, 15
Hess v. *Norfolk S. Ry.*, 795 N.E.2d 91 (Ohio Ct. App. 2003), *appeal allowed*, 804 N.E.2d 40 (Ohio 2004) 24
Loyal v. *Norfolk S. Corp.*, 507 S.E.2d 499 (Ga. Ct. App. 1998) 17, 20, 23
Mellon v. *Goodyear*, 277 U.S. 335 (1928) 2, 12, 13, 14, 15
Metro-North Commuter R.R. v. *Buckley*, 521 U.S. 424 (1997) 16
Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003) 2, 10, 15, 21, 23

TABLE OF AUTHORITIES – continued

	Page
Ortiz v. *Fireboard Corp.*, 527 U.S. 815 (1999)	21
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957)	5
Sea-Land Serv., Inc. v. *Sellan*, 231 F.3d 848 (11th Cir. 2000)	3, 17, 20
South Buffalo Ry. v. *Ahern*, 344 U.S. 367 (1953)	3
Stephens v. *Alabama State Docks Terminal Ry.*, 723 So. 2d 83 (Ala. Civ. App. 1998)	17, 18
Urie v. *Thompson*, 337 U.S. 163 (1949)	5
Wicker v. *Consolidated Rail Corp.*, 142 F.3d 690 (3d Cir. 1998)	*passim*
Wilson v. *Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982)	15
Wolf v. *Consolidated Rail Corp.*, 840 A.2d 1004 (Pa. Super. Ct. 2003)	17, 20

STATUTES

Federal Employers' Liability Act, Pub. L. No. ch. 14, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 et seq.)	1
28 U.S.C. § 1257	10
45 U.S.C. § 51	4
45 U.S.C. § 55	4
45 U.S.C. § 56	24

LEGISLATIVE HISTORY

H.R. Rep. No. 60-1386 (1908)	3, 5
S. Rep. No. 60-460 (1908)	5

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES Page

Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002), *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf 21, 22

Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986) 22

OTHER AUTHORITIES

Check Locations, CSX Corp. Web Site (July 23, 2004), *at* http://www.csx.com..... 24

Distribution Network, Norfolk Southern Web Site (last visited July 23, 2004), *at* http://www.nscorp.com..... 24

Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991)..... 22

Restatement (Second) Of Torts (1965)..... 15

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001..... 21

PETITION FOR A WRIT OF CERTIORARI

Petitioners Norfolk & Western Railway Company, Norfolk Southern Railway Company, and Norfolk Southern Corporation (collectively "Norfolk Southern") respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is reported at 797 N.E. 2d 537 (Ohio Ct. App. 2003), and is reproduced in the Petition Appendix ("App.") at 1a-15a. The orders of the trial court are not reported, and are reproduced at App. 16a-19a.

JURISDICTION

The Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, entered judgment on September 18, 2003. The Supreme Court of Ohio denied a timely petition for discretionary appeal on March 3, 2004, App. 21a, and denied a timely petition for reconsideration on April 28, 2004, App. 20a. This Court has jurisdiction under 28 U.S.C. § 1257 and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), ch. 149, 35 Stat. 65 (1908) (codified as amended, 45 U.S.C. § 51 et seq.), are reproduced at App. 22a-24a.

STATEMENT OF THE CASE

In this case, respondent Shirley Anderson and her husband Lester Anderson, a former railroad employee who had last worked for the railroad in 1963, brought suit in 1984 against

petitioners and other defendants seeking damages for Mr. Anderson's asbestosis and other asbestos-related injury. In 1986, with the advice of counsel, the Andersons negotiated an agreement with petitioners settling their claims and executed a general release, which expressly included any future claims relating to any asbestos-related cancer (including mesothelioma) that Mr. Anderson might later develop. It is undisputed that in 1986 the Andersons knew that, given Mr. Anderson's existing asbestosis, he was at risk of contracting mesothelioma.[1] Although mesothelioma claims were expressly covered in the general release, respondent in 2000 brought wrongful death and survival actions for mesothelioma against Norfolk Southern. The state appellate court below permitted the actions to go forward, holding that the general release was invalid under Section 5 of FELA, which voids any contract to the extent it exempts a carrier from liability under the Act, 45 U.S.C. § 55, because the mesothelioma claims had not accrued at the time the release was executed. App. 13a.

The ruling below is in flat conflict with this Court's decisions in *Mellon* v. *Goodyear*, 277 U.S. 355 (1928), and *Callen* v. *Pennsylvania Railroad*, 332 U.S. 625 (1948). Those decisions establish that general releases that are executed after the alleged wrongful act in settlement of a claim do not offend FELA's prohibition against liability exemptions, even if the cause of action has not yet accrued. Moreover, there is now a mature and acknowledged 2-1 split in the federal courts of appeals, with multiple state appellate courts on both sides of the divide. The court below joins the Sixth Circuit in holding that the only valid release under section 5 of FELA is a release of a "known claim for a

---

[1] Asbestosis is a noncancerous scarring of the lungs caused by breathing asbestos fibers. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 142 n.2 (2003). Mesothelioma is a rare cancer of the lining of the stomach or lung typically associated with high levels of asbestos exposure (as is asbestosis). *Id.* at 142.

specific injury." *Babbitt* v. *Norfolk & W. Ry.*, 104 F.3d 89, 93 (6th Cir. 1997); App. 11a. By contrast, the Third Circuit, explicitly declining to follow the Sixth Circuit, has held that a FELA plaintiff may in compromise of an existing claim execute a release of future unaccrued claims, so long as it is known at the time that the plaintiff was at risk of developing diseases covered by the release. *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 702 (3d Cir. 1998). The Eleventh Circuit follows the same rule as the Third Circuit. *Sea-Land Serv., Inc.* v. *Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). Under the *Wicker* rule, Norfolk Southern would have prevailed below.

This Court is vigilant to resolve conflicts under FELA because a "uniform application" of the statute "throughout the country is essential to effectuate its purposes." *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952).[2] This Court's intervention is especially critical as litigants and the courts continue to grapple with the behemoth of asbestos litigation. Asbestos-related claims, particularly by plaintiffs with noncancerous injuries and minimal impairment, are choking the courts. Because trial of the hundreds of thousands of asbestos claims in the nation's courts is impossible, the vast majority of asbestos claims that have been resolved have been settled. Railroads, including Norfolk Southern, typically have paid a higher settlement value for noncancerous claims than those claims would command in

---

[2] *See also South Buffalo Ry.* v. *Ahern*, 344 U.S. 367, 370 (1953) (Congress "intended" FELA to be a "uniform scheme"); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) ("[FELA] requires uniform interpretation"). Congress also addressed the importance of uniformity:

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.

H.R. Rep. No. 60-1386, at 3 (1908).

their own right (given that the proof of injury and causation is difficult for noncancerous conditions and damages often are minimal), and have received, in return, a release of future asbestos-related claims (including claims for asbestos-related cancer). Plaintiffs have been willing to execute these releases because only a small percentage actually develop asbestos-related cancer, and because they retain their right to sue other defendants (such as asbestos manufacturers) notwithstanding the release negotiated with the railroad.

The rule adopted below casts thousands (and perhaps tens of thousands) of existing FELA settlements into doubt and invites forum shopping; plaintiffs who develop mesothelioma or any other asbestos-related disease that was not manifest at the time of the release will bring their claims in favorable circuits under the liberal venue rules of FELA. Moreover, the state appellate court's ruling injects tremendous uncertainty into the settlement process prospectively. Railroads will not continue to pay substantial settlements for releases of uncertain validity. Disincentives for settlement will only exacerbate the asbestos litigation crisis that this Court has decried. Accordingly, this Court should vindicate the rule of *Callen* and *Mellon*. But, at a minimum, this Court must establish a clear national rule on which the parties can rely in settling asbestos and other occupational exposure claims under FELA.

A. Statutory Background

Section 5 of FELA states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void." 45 U.S.C. § 55.[3] Federal law governs the validity of

---

[3] Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the

releases under FELA. *Dice*, 342 U.S. at 361. The party attacking the release bears the burden of showing that the release is invalid. *Callen*, 332 U.S. at 629-30. Section 6 provides concurrent jurisdiction for the federal district courts and state courts. 45 U.S.C. § 56.

In 1908, FELA "was enacted because Congress was dissatisfied with the common-law duty of the master to his servant." *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 507 (1957). The traditional common law rules made it difficult for railroad workers to recover for injuries sustained on the job, and the various states applied inconsistent tort law rules. Accordingly, FELA modified the common law and established a uniform national standard. For example, the Act abolished certain common-law defenses, and, in Section 5, sought to prevent employers from contracting out of liability with their workers. See S. Rep. No. 60-460, at 2-3 (1908). Section 5 was aimed at the practice whereby railroads "insisted on a contract with their employees, discharging the company from liability for personal injuries." H.R. Rep. 60-1386, at 6 (1908).

B. Factual Background

This cases arises out of personal injuries sustained by Lester Anderson that, according to the allegations in the complaint, were a result of his alleged exposure to asbestos while an employee of the railroad and its predecessors. From 1940 until 1961, Lester Anderson was employed as a locomotive mechanic by the Nickel Plate Railway Company, save for service in the United States Navy from 1944 to 1946. From 1961 through 1963, Lester Anderson was employed by the New York Central Railroad Company as a sheet metal and maintenance worker.

---

requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949).

More than 20 years after Mr. Anderson's employment at the railroads had ended, he and respondent Shirley Anderson, his wife, filed their first action against petitioners as well as against various asbestos manufacturers on November 20, 1984, seeking compensation for personal injuries purportedly sustained by Mr. Anderson as a result of his exposure to asbestos while an employee of the railroad and its predecessors. That case was captioned, *Lester Anderson, et al.* v. *Norfolk & Western Railway Co., et al.*, Case No. CV-84-83441 (Cuyahoga County Ct. Com. Pl., Nov. 20, 1984).

On March 26, 1986, with the advice and consent of counsel and in consideration for receiving settlement funds in the amount of $50,000, Mr. and Mrs. Anderson both executed a covenant not to sue and to cease suing the railroad defendants ("release" or "covenant"). The covenant specifically provided that "this agreement . . . constitutes a compromise in settlement of a disputed claim." App. 26a-27a. The covenant included a general release of claims against the railroads and their successors arising from Mr. Anderson's past railroad employment, *id.* at 25a-26a, and specifically included the following:

> IT IS FURTHER AGREED AND UNDERSTOOD without any limitation on the foregoing that this agreement includes on behalf of LESTER ANDERSON, his successors and assigns any claim, demand, right or cause of action for injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion of any substance whatsoever including but not limited to asbestos dust or fiber and any diseases resulting therefrom as well as asbestosis or asbestos-related disease, illness or injury including any and all forms of cancer or mesothelioma, claimed to be related to asbestos or any other substances whether or not presently alleged or manifested.

Id. at 27a.

When the Andersons signed the release, with the advice and consent of counsel on March 26, 1986, Lester Anderson had asbestosis and was aware of his potential risk of developing mesothelioma.[4] He received valid consideration to release his risk for developing mesothelioma. The railroad did not offer $50,000 simply to settle Mr. Anderson's claim for asbestosis. Thus, the covenant not only terminated the 1984 action against the railroads and disposed of Mr. Anderson's existing claim for asbestosis and other bodily injuries, but also disposed of any future claims of either Mr. Anderson or his heirs, including his wife, for any asbestos-related injury against the railroad, specifically including any claims for mesothelioma.

Mr. Anderson contracted mesothelioma and died in 1998. Notwithstanding the release she had signed, respondent Shirley Anderson, individually and in her capacity as the Executrix of the Estate of Lester Anderson, filed this FELA action against petitioners on March 29, 2000. In particular, Mrs. Anderson alleged both a wrongful death and survival claim against petitioners on the grounds that Mr. Anderson's mesothelioma was caused in part by asbestos exposure during his railroad employment.

Petitioners filed for summary judgment in December 2001, arguing that they were entitled to judgment as a matter of law

---

[4] This is reflected in Mr. Anderson's answer to Interrogatory No. 57 in the 1984 lawsuit:

> (a) Plaintiff has experienced chronic cough and constant phlegm in the chest, among other problems which have made the performance of many activities more difficult. Additionally, Plaintiff has become nervous and depressed due to his asbestos exposure and *the potential risk of contracting other lung diseases and cancer.*

Mot. for Summ. J. App. E at 37 (emphasis added). Moreover, Mr. Anderson was under the care of a physician, Dr. Pr. Paul Venizelos, who contemporaneously had opined that individuals exposed to asbestos had an increased chance of developing lung cancer and mesothelioma. *See id.* App. F at 39, 52-54.

based upon the prior executed release. On October 3, 2002, the trial court determined that the release precluded the survival claim as a matter of law, but the trial court permitted the wrongful-death claim to go forward. App. 18a.

Despite the order of the trial court barring the survival claim, on January 6, 2003, respondent filed a motion to allow evidence of the survival claim and damages to be presented at trial. In denying that motion, on January 7, 2003, the trial court stated:

> The Court after oral arguments and briefs found that the Plaintiff's survival claims were extinguished by a release executed by Lester Anderson on March 26, 1986. *The Court finds that the release was signed after consulting with counsel and Plaintiff's awareness of the potential risks of contracting other lung diseases and cancer.* Plaintiff's motion to allow evidence of Lester Anderson's survival claim and damages . . . is denied. Judgment for Defendants.
>
> Final. There is no just reason for delay.

App. 16a (emphasis added).

From this judgment, counsel for Mrs. Anderson instituted an appeal as of right to the Court of Appeals of Ohio, Eighth Appellate District challenging the trial court's grant of summary judgment in favor of petitioners on the survival claim. In turn, petitioners filed a cross-appeal seeking review of the trial court's ruling that the wrongful death claim was not barred by the release. The appeals were consolidated.

C. Proceedings in the Court Below

The Ohio Court of Appeals affirmed the trial court's order denying petitioners summary judgment on respondent's wrongful death claim and reversed the trial court's order granting petitioners summary judgement on the survival claim. App. 1a-15a. The court held that the release is void to the extent that it applied to the mesothelioma claim because

that claim was unaccrued and unknown at the time the release was executed. "[U]nder FELA, a release is valid only where it disposes of an accrued claim for a known injury." *Id.* at 12a.

The court acknowledged that in *Callen* this Court had upheld the validity of general liability releases executed after the wrongful act under section 5 of FELA. App. 8a-9a ("'The [*Callen*] Court noted that the release was "not a device to exempt from liability but a means of compromising a claimed liability" . . . .'") (quoting *Callen*, 332 U.S. at 631)). Nonetheless, the court of appeals noted that "*[a]lthough the majority of courts have not so found,* 'the Sixth Circuit has adopted a bright-line rule that a release may be valid only with regard to injuries that are known at the time the release is executed.'" *Id.* at 13a (emphasis added) (quoting *Loyal* v. *Norfolk S. Corp.*, 507 S.E.2d 499, 502 n.4 (Ga. Ct. App. 1998)). The state appellate court adopted that minority rule, holding that "'[t]o be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury.'" *Id.* at 11a (emphasis omitted) (quoting *Babbitt*, 104 F.3d at 93). The court of appeals explicitly declined to follow the Third Circuit's rule in *Wicker* allowing releases for "'risks which are known.'" *Id.* at 12a. Applying the *Babbitt* rule, the court reasoned that "because [Mr. Anderson] did not have mesothelioma when he signed the release, his claim had not yet accrued and, therefore, he could not release it." *Id.* at 13a.[5]

---

[5] The court also relied on the flawed reading of *Callen* in *Fannin* v. *Norfolk & Western Railway*, 666 N.E. 2d 291 (Ohio Ct. App. 1995), to support the narrow construction. According to *Fannin*,

> "[w]hile such language [in *Callen*] seems to indicate that parties may indeed settle FELA claims via a release, it is clear that this only applies to claims which have already arisen *at the time the release is signed*; the release is valid only 'where controversies exist,' i.e., where it disposes of an accrued FELA claim."

App. 11a-12a (quoting *Fannin*, 666 N.E.2d at 295).

In so doing, the court cast aside the specific language of the release relating to asbestos-related illnesses, including mesothelioma, and found it significant that the general release contained broad language. The court surmised, "it is apparent from the plain language of the release that the intent of the release was to exempt appellees from all potential liability related to Lester Anderson's employment." App. 10a.

The court also took refuge in Justice Kennedy's discussion in *Norfolk & Western Railway* v. *Ayers*, 538 U.S. 135 (2003), of the separate-disease rule, which provides that a claim for asbestos-related cancer does not accrue until the cancer is manifest, and may be brought even if the plaintiff has previously filed claims for other asbestos-related diseases. App. 14a (citing *Ayers*, 538 U.S. at 174 (Kennedy, J., concurring in part and dissenting in part)). Thus, the state appellate court concluded that, notwithstanding the explicit release of future mesothelioma claims, "settlement of the asbestosis claim does not bar her subsequent recovery for a mesothelioma claim." *Id.* at 15a.

Subsequently, in a 4 to 3 decision, the Supreme Court of Ohio denied a timely petition for discretionary appeal on March 3, 2004, and a timely petition for reconsideration on April 28, 2004. The Ohio Court of Appeals affirmation of the trial court's order denying petitioners summary judgment on respondent's wrongful death claim and reversal of the trial court's order granting petitioners summary judgment on the survival claim constitutes a final decision under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Under *Cox*'s fourth category of effectively final judgments under 28 U.S.C. § 1257, federal issues may be reviewed by this Court when the federal issue has been finally decided by the state court, and when, despite further proceedings to come, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state

proceedings still to come." 420 U.S. at 482-83. The validity of releases under FELA has been finally decided by the state court below. Reversal by this Court would be preclusive of the respondents' causes of action, rather than controlling the scope or character of their adjudication (and would spare the waste of state judicial resources). Moreover, "a refusal immediately to review the state-court decision might seriously erode federal policy," *id.* at 483, because of the state court's break from the rule of *Mellon* and *Callen* and the negative effects of the ruling below on the efficient resolution of FELA asbestos-injury claims. See *id.*; *infra* at 21-24. Indeed, this Court has regarded a state court decision on the validity of an agreement under section 5 as final notwithstanding proceedings to come on remand. *Boyd* v. *Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (per curiam) (reviewing agreement to restrict venue).

REASONS FOR GRANTING THE PETITION

"[T]he scope of § 5 is of fundamental importance in the administration of the Federal Employers' Liability Act . . . ." *Duncan* v. *Thompson*, 315 U.S. 1, 5 (1942). The decision below directly conflicts with this Court's precedents applying section 5 to settlement agreements, and exacerbates an already mature and acknowledged conflict in the circuits. This Court's review is necessary to re-establish that a general release of all claims made with advice of counsel and in good faith as part of a settlement agreement that is executed after the alleged wrongful act is committed does not offend FELA's prohibition against liability exemptions.

Moreover, review is especially critical given the importance of settlements in managing the asbestos litigation crisis. The incentive to settle claims and "buy their peace" when actual injury may be unknown is consistent with FELA's goals of fair compensation for injured workers. By invalidating the release in this case, the lower court has called into question thousands of FELA asbestos settlements reached with

employees that include the release of future claims, and has injected substantial uncertainty into the settlement process. In sum, this Court's review of the question presented here is imperative.

I. THE RULING BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS.

Long ago this Court established the validity of general releases under section 5 of FELA for future, unaccrued causes of action. In *Callen* v. *Pennsylvania Railroad*, the Court explained that a general release of all future claims executed after the alleged wrongful act is committed does not offend FELA's prohibition of liability exemptions. 332 U.S. 625, 630-31 (1948). Coupled with this Court's decision in *Mellon* v. *Goodyear*, such a release may include unaccrued causes of action resulting from the same wrongful act. 277 U.S. 335 (1928). The Ohio Appeals Court misconstrued *Callen* and ignored *Mellon*.

In *Callen* the plaintiff-employee sustained a back injury while working and entered into a settlement agreement with the employer-railroad. 332 U.S. at 626-27. For consideration (of $250) the plaintiff executed a general release of his claims arising out of the accident which caused the back injury (for "'all claims and demands which [plaintiff] have or can or may have against [the railroad].'") *Id.* at 626. Significantly, at the time the plaintiff executed the general release, he had not been diagnosed with, and was *unaware* that he had sustained, a permanent back injury. *Id.* at 627.

Subsequently, when plaintiff sought damages under FELA for a severe and permanent back injury, this Court upheld the general release. In rejecting the plaintiff's argument that the release "violates § 5 of the Federal Employers' Liability Act[,]" *id.* at 630, the Court stated:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. Moreover, the Court explained that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Id.* at 630. The fact that the employee did not know he had a permanent back injury was irrelevant to the validity of the release. As such, *Callen* makes clear that where there is a specific injury claim, a bona fide compromise of that claim – including a release of all future claims known or unknown – the release is valid under FELA.

The state appellate court below found that *Callen* did not save the release here because Mr. Anderson's mesothelioma had not manifested itself at the time of the settlement agreement, and thus his mesothelioma claim had not accrued. App. 13a. And because Mr. Anderson's mesothelioma claim had not yet accrued in 1986, the state court reasoned, "therefore, he could not release it." *Id.* But that reasoning runs directly afoul of *Mellon* v. *Goodyear*, 277 U.S. 335 (1928). In *Mellon*, this Court held that a general release of all future claims may bar unaccrued causes of action for the same wrongful conduct. The lower court simply ignored this decision.

In *Mellon*, the plaintiff-employee sustained personal injuries and, after bringing a FELA claim, settled with his employer for those specific injuries. For consideration he executed a general release "'for all claims and demands for all damages resulting from the injuries'" that may have been brought by him or his estate. *Id.* at 337. Subsequent to executing the release, the employee died, and his widow brought a wrongful death claim under FELA. *Id.*

The Court held that the release barred the subsequent, "unaccrued" wrongful death claim because the claim was based upon the same alleged tortious conduct for which the railroad had been released. According to the Court:

> By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act.

Id. at 344. The Court further explained:

> "The position taken by the courts is fairly summed up as follows: 'Whether the right of action is a transmitted right or an original right, whether it be created by a survival statute or by a statute creating an independent right, *the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act*, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed.'"

Id. at 345 (quoting *Strode* v. *Transit Co.*, 95 S.W. 851, 856 (Mo. 1906)). Thus, according to *Mellon*, the unaccrued claim of wrongful death was covered by the general release, as it applied to the same alleged wrongful act as in the previous lawsuit and settlement.[6]

---

[6] *See also Gilmore* v. *Southern Ry.*, 229 F. Supp. 198 (E.D. La. 1964). In relying on *Mellon* to dismiss a wrongful death claim, the court agreed that "there is no right of action on the part of the heirs or widow of the decedent since any claim that he had or may have had was clearly

This rule escaped the lower court. Following the *Babbitt* decision of the Sixth Circuit, the Ohio court limited the coverage the general release to *known* and *accrued* claims, despite the fact that the subsequent mesothelioma claim stems from the same alleged wrongful act, namely negligent exposure to asbestos, as the settled asbestosis claim.

The lower court found it significant that asbestosis and mesothelioma are "separate and distinct diseases that give rise to separate and distinct causes of action under FELA." App. 12a. But the separate-disease rule has no effect on the power of a plaintiff to execute a valid release of unaccrued claims under *Mellon*, which depends only on whether the future claim concerns the same "wrongful act" as the claim currently in dispute. 277 U.S. at 345. The separate-disease rule simply "allows a person who has recovered for injuries resulting from asbestosis to bring a new lawsuit – notwithstanding the traditional common-law proscription against splitting a cause of action – if cancer develops." *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 174 (2003) (Kennedy, J., concurring in part and dissenting in part); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 120-21 (D.C. Cir. 1982) (Ginsburg, J.) (noting that the separate-disease rule is a policy-based rule for applying the statute of limitations, based on weighing considerations of repose against countervailing considerations of evidentiary accuracy, fairness, and deterrence of premature lawsuits). In relaxing the single-action rule as a matter of policy, the separate-disease rule does not presuppose that there are separate torts, or even separate "injury" under FELA, when an asbestotic employee subsequently develops mesothelioma. "Injury" in tort law is an "invasion of any legally protected interest." *Restatement (Second) Of Torts* § 7(1) (1965). Asbestos exposure is the invasion of the plaintiff's interest in bodily freedom from toxic agents, but this Court has held in effect that the interest does not receive legal protection until

---

extinguished as a result of the settlement and release agreement." *Id.* at 199.

the plaintiff manifests an asbestos related disease. *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 427 (1997). Thus, the development of mesothelioma is not a new "injury" under FELA, *i.e.*, there was no separate "invasion" by Norfolk Southern of any interest of the plaintiff at that time. Rather mesothelioma is a consequential physical harm from the same injurious wrongful act, but one which gives rise to a separate cause of action under the separate-disease rule. Accordingly, even under the separate-disease rule, the injured party may still execute a release of all future claims stemming from the original wrongful act, and that release is valid even if the cause of action had not accrued at the time of release.

Here, Lester Anderson had filed a specific claim for damages arising from his asbestosis and other injuries in 1984. With advice of counsel and knowledge of his future risks of contracting mesothelioma and other cancers, and for substantial consideration, he executed a bona fide compromise of that claim in 1986 which included a release of future claims (explicitly including mesothelioma). The ruling below, allowing both survival and wrongful-death actions to proceed even though they are predicated upon the same tortious conduct for which the release was executed, is irreconcilable with *Callen* and *Mellon*, and should be reversed.

II. THERE IS A MATURE AND ACKNOWLEDGED CONFLICT AMONG THE LOWER COURTS CONCERNING THE VALIDITY OF FELA RELEASES.

Despite the clear rule of *Callen* and *Mellon*, a mature split in the federal circuits has developed over the standards to apply to liability releases under FELA. The Sixth Circuit was the first to narrow the effect of this Court's precedents. In *Babbitt* v. *Norfolk & Western Railway*, the court of appeals adopted the bright line rule limiting releases to "a known claim for a specific injury." 104 F.3d 89, 93 (6th Cir. 1997). Subsequently, the Third Circuit, in *Wicker* v. *Consolidated*

Rail Corp., explicitly declined to adopt the Sixth Circuit rule. 142 F.3d 690, 701 (3d Cir. 1998). The Third Circuit held that a FELA plaintiff may release future claims that cover "known risks even if there is no present manifestation of injury," explaining that "[w]hile the elusiveness of any such determination might counsel in favor of a bright-line rule such as adopted in *Babbitt*, *we decline to adopt one here*." *Id.* (emphasis added). The Eleventh Circuit, in addressing the validity of a post-injury settlement release under FELA, distinguished *Babbitt* and chose to follow the Third Circuit's *Wicker* rule. *Sea-Land Serv., Inc.* v. *Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). The result has been widespread confusion. Indeed, various courts have expressly recognized the existence of a substantial and continuing conflict among the authorities on this question.[7] There are now multiple state appellate courts (including the court below) on each side of the divide. Compare App. 10a-12a (following *Babbitt*), and *Stephens* v. *Alabama State Docks Terminal Ry.*, 723 So. 2d 83, 86-87 (Ala. Civ. App. 1998) (same), with *Loyal* v. *Norfolk S. Corp.*, 507 S.E.2d 499, 502 & n.4 (Ga. Ct. App. 1998) (following *Wicker*), and *Wolf* v. *Consolidated Rail Corp.*, 840 A.2d 1004, 1007 (Pa. Super. Ct. 2003) (same).

---

[7] *See, e.g.*, *Loyal* v. *Norfolk S. Corp.*, 507 S.E.2d 499, 502 n.4 (Ga. Ct. App. 1998) (noting "[o]nly the Sixth Circuit has adopted a bright line rule that a release may be valid *only* with regard to injuries that are known at the time the release is executed. The majority of courts have not so found.") (citations omitted); *Davison* v. *Norfolk S. Ry.*, CL02-36, 2003 WL 21536815, at *3 (Va. Cir. Ct. June 6, 2003) (noting "[t]he only clear articulation by federal circuit courts of the standard to be used in analyzing such a release, that I have found, comes from the Third Circuit and Sixth Circuit. The Sixth Circuit has held that '[t]o be valid, a release must reflect a bargained for settlement of a known claim for specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.' The Third Circuit has declined to follow such a bright line rule.") (footnote omitted).

1. The Sixth Circuit was the first to run afoul of *Callen* and *Mellon* by upholding only releases of known claims for a specific injury as valid under section 5. In *Babbitt*, the court addressed a release by railroad employees accepting a "buy-out" or severance from the company. *Babbitt*, 104 F.3d at 90. The plaintiff-employee signed an agreement releasing the railroad from any and all claims they may have against the company, known and unknown. Subsequently, the employee brought a FELA claim for hearing loss. *Id.*

Rather than rely on a distinction between severance agreements and settlements in compromise of a claim, see *id.*, the Sixth Circuit instead leapt to establish a bright-line rule for upholding releases under section 5 of FELA: "[t]o be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* at 93. This bright-line rule directly conflicts with *Callen* and *Mellon* by severely limiting the scope of liability releases contained in settlement agreements of existing claims.

It was this flawed decision that led the state court below astray, even though it acknowledged that "the majority of courts" have not adopted the *Babbitt* bright-line rule. App. 13a. In fact, the court of appeals decision goes further than did *Babbitt*, as it applied *Babbitt* to a release that settled a specific prior claim. Other courts beyond the court below have likewise adopted the *Babbitt* rule. See, *e.g.*, *Stephens*, 723 So. 2d at 86-87 (relying on *Babbitt* in finding that a post-injury general release does not apply to a new injury or the aggravation of the old injury).

2. In contrast to the Sixth Circuit's "known claim" approach, other circuits have adopted a more fact-based "known risk" approach to liability releases under FELA. The first federal court of appeals to disavow *Babbitt* was the Third Circuit. It held in *Wicker* v. *Consolidated Rail Corp.* that "[w]hile the elusiveness of any such determination might

counsel in favor of a bright-line rule such as adopted in *Babbitt, we decline to adopt one here.*" 142 F.3d at 701 (emphasis added).

In *Wicker*, plaintiff-employees, who had previously signed general releases as part of injury claim settlements, brought suits alleging new injuries. The court acknowledged that "the proper application and reach of § 5 remains unclear" and postulated that this is because decisions addressing general releases tend to be fact-driven. *Id.* at 698. Regarding *Callen*, the court stated that "[a]lthough the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Id.* After looking in vain for a limiting rule from this Court that it presumed was lacking in *Callen*, the court added, "[n]ot surprisingly, lower courts that have addressed this issue have disagreed on the proper interpretation of § 5." *Id.* at 699.

Addressing the Sixth Circuit's rule, the court explained that such a narrow rule was inimical to the interests of both employee and employer. It reasoned that:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

Id. at 700-01. As a result, the Third Circuit held that a release does not violate section 5 "provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those *risks* which are *known* to the parties

at the time the release is signed." *Id.* at 701 (emphases added).

The conflict in the federal circuits was further deepened when the Eleventh Circuit embraced the *Wicker* approach. The Eleventh Circuit addressed the validity of a post-injury settlement release under section 5 of FELA in *Sea-Land Service, Inc.* v. *Sellan*, 231 F.3d 848 (11th Cir. 2000). The court explained, "[c]ontrary to [plaintiff's] argument, enforcement of the Agreement is consistent with the *Wicker* holding . . . . The Agreement was intended *to prevent the very risk at issue here*." *Id.* at 852. Other appellate courts outside of the Third Circuit have followed the *Wicker* rule as well. See *Loyal*, 507 S.E.2d at 502; *Wolf*, 840 A.2d at 1007.

Had the Ohio court below followed the lead of the Third and Eleventh Circuits, Norfolk Southern would have prevailed below. According to *Wicker*, a valid release can cover claims for a disease that is not necessarily present at the time of execution if the risk of the plaintiff's later contracting that disease is known. This is precisely the situation the court of appeals faced. Even if the actual disease of mesothelioma was not manifest at the time Mr. Anderson executed the release, he knew of his risk of developing mesothelioma at that time. Valid consideration was received for that risk. Therefore, under *Wicker*, the release here blocks Mrs. Anderson's wrongful death and survival claims resulting from Mr. Anderson's death from mesothelioma.

The disarray in the lower courts on this issue of fundamental importance under FELA, *Duncan*, 315 U.S. at 5, stems from a patent misinterpretation of *Callen* and inattention to *Mellon*. This Court has emphasized that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Callen*, 332 U.S. at 630. There is no basis for the unduly stringent rule of *Babbitt* followed below. The mature and acknowledged 2-1 split in the federal circuits, with multiple state appellate courts on either side of the divide,

undermines what was intended to be a national standard. This Court should act now to bring clarity and closure to the standards that apply to releases under FELA.

III. REVIEW IS NECESSARY TO FORESTALL FURTHER DEGENERATION OF THE ASBESTOS-LITIGATION CRISIS

As this Court has emphasized time and again, this nation is mired in an asbestos-litigation crisis, *Amchem Products Inc.* v. *Windsor*, 521 U.S. 591, 597 (1997), and "the elephantine mass of asbestos cases . . . defies customary judicial administration." *Ortiz* v. *Fireboard Corp.*, 527 U.S. 815, 821 (1999); see also *Ayers*, 538 U.S. at 166. Over 600,000 asbestos-injury claims had been filed nationally by the end of 2000, costing businesses more than $54 billion. Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* vi-vii (2002), *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf ("RAND Study"). The filing of new claims is sharply accelerating, 90% of which are asserted by plaintiffs alleging nonmalignant injuries. *Id.* at 40-46. Over 6,000 defendants in 75 of the 83 industries in the United States are defending asbestos claims. *Id.* at vi-vii; Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); see also *Ayers*, 538 U.S. at 169 (Kennedy, J. concurring in part and dissenting in part) ("Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000."). It is projected that current claims are only one-fifth to one-half of the total number of claims that will be filed, and the estimated total future costs of asbestos litigation range as high as $265 *billion*. RAND Study at vii; *Ayers*, 538 U.S. at 186 (Breyer, J., concurring in part and dissenting in part); see also Brief of Association of American Railroads as *Amicus Curiae* at 6 n.10, *Norfolk &*

W. Ry. Co. v. *Ayers*, 538 U.S. 135 (2003) (No. 01-963) (noting that in only a five-year period, from 1996 through 2000, over 7,500 asbestos-related FELA suits were filed against railroads, comprising 45 percent of all FELA suits in 2000). Transaction costs (such as lawyers' fees) already have consumed over half of the $54 billion spent to date on asbestos litigation. RAND Study at vii.

It has long been recognized that it is a procedural impossibility to conduct trials of the hundreds of thousands of pending asbestos-claims, which are complex, time-consuming, and expensive to litigate. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991). With limited exception, in the railroad context, asbestos-related claims under FELA generally have been resolved by settlement. Cf. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 480 (1986) (explaining that approximately ninety-eight percent of asbestos disease cases that are resolved are settled). This is especially true for noncancerous claims, which involve much lower damages than cancer claims but similarly high transactions costs. Typically, Norfolk Southern's settlements compromising an asbestosis or other noncancer claim, like the 1986 agreement at issue here, involve a release of all asbestos-related claims, including lung cancer and mesothelioma claims.

Such settlements are fully in accord with FELA's goals of fair compensation for injured workers. Plaintiffs who execute such releases gain substantially higher settlements than if they had released only their currently accrued noncancerous claims, and the railroads purchase peace and predictability in managing their liability risks. See *Wicker*, 142 F.3d at 695 (noting district court finding that plaintiffs who sign general releases tend to receive higher larger settlements, and defendants are willing to pay higher sums to settle claims under a general release). Those settlements may be smaller

than damages awards in mesothelioma cases. But such settlements reflect the rational calculation of plaintiffs (with advice of counsel) that most persons with noncancerous asbestos injuries (even asbestosis) do not contract cancer, *Ayers*, 538 U.S. at 178-79 (Kennedy, J., concurring in part and dissenting in part); that any award of damages for cancer may be (as here) decades away, given the long latency periods for mesothelioma and other types of cancer, *id.* at 175 (Kennedy, J., concurring in part and dissenting in part); that plaintiffs avoid the litigation costs of trial and the risk that they may not be able to prove the railroad's liability; and that the plaintiffs retain the right to sue other defendants (such as asbestos manufacturers) if they contract cancer, a right expressly reserved in this agreement, App. 28a. In sum, it is often in the interest of the plaintiff as well as the railroad to secure immediate and permanent settlement of all asbestos-related claims. *Wicker*, 142 F.3d at 700-01; *Loyal*, 507 S.E.2d at 502 ("Clearly, in an industry, such as the railroad industry, that has a number of known occupational risks and diseases, it is important for both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery.").

The nullification of thousands of existing settlements with asbestos plaintiffs accomplished by the rule adopted below underscores the importance of the issue on which the courts are divided, but even more critical is the uncertainty it injects prospectively into the settlement process. Railroads will not continue to negotiate substantial settlements with plaintiffs alleging noncancerous injuries if the releases the railroads receive in return are invalid. Such disincentives to rational settlements will impede the efficient clearing of asbestos dockets, thus creating greater burdens on the courts and raising the share of resources that are devoted to transaction costs (*i.e.*, trial preparation and litigation) rather than plaintiff recoveries.

Not only is the rule below wrong and destructive, and contrary to this Court's precedents, but the conflict in the circuits also invites forum shopping. Under FELA's liberal venue rules, plaintiffs have their choice to sue in any jurisdiction where the railroad operates. 45 U.S.C. § 56; *Boyd* v. *Grand Trunk W. R.R.*, 338 U.S. 263, 265 (1949). Norfolk Southern currently operates in multiple circuits, including the Third, Sixth, and Eleventh. See Distribution Network, Norfolk Southern Web Site (last visited July 23, 2004) (system map), *at* http://www.nscorp.com. So too does CSX Transportation, Inc., the other major Class 1 Eastern railroad. See Check Locations, CSX Corp. Web Site (July 23, 2004) (system map), *at* http://www.csx.com. A cancer plaintiff who has previously released his claim can simply choose to sue Norfolk Southern or CSX in the Sixth Circuit (or the state of Ohio) to avoid the *Wicker* rule, even if his claim belongs more properly in the Third or Eleventh Circuit or some other jurisdiction.[8]

It is antithetical to the uniformity mandate of FELA, *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952), for conflicting rules in the lower courts to be left unresolved. Given the mature and acknowledged split in the circuits, the fundamental importance of section 5, *Duncan*, 315 U.S. at 5, and the destructive effects of uncertainty upon efficient settlement of mounting asbestos-related claims, this Court should grant review.

---

[8] The appointed judge who presides over the asbestos docket in the Court of Common Pleas in Cuyahoga County, Ohio, summarily denies forum non conveniens motions to dismiss the complaints of out-of-state plaintiffs, *see, e.g.*, *Hess* v. *Norfolk S. Ry.*, 795 N.E.2d 91, 95-97 (Ohio Ct. App. 2003), *appeal allowed*, 804 N.E.2d 40 (Ohio 2004) (table), which has made that particular jurisdiction a magnet for asbestos-related litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS E. DOVER
KEVIN C. ALEXANDERSEN
MONICA A. SANSALONE
HOLLY M. OLARCZUK-SMITH
GALLAGHER, SHARP, FULTON, & NORMAN
1501 Euclid Ave., Seventh Flr.
Cleveland, Ohio 44115
(216) 241-5310

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
CHRISTIAN M. L. BONAT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LAURA D. HUNT
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510-9242
(757) 664-5022

Counsel for Petitioners

July 27, 2004

* Counsel of Record